U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

March 13, 2000

Patricia Mack Bryan, Esq.
Senate Legal Counsel
United States Senate
Senate Hart Office Building
Room 642
Washington, DC 20510-7250

Re: United States v. Mark Grigsby, No. 99-0711L
(D.R.I. February 24, 2000)

Dear Ms. Bryan:

I am writing to advise you that the Department of Justice will not appeal the district court ruling in the above-referenced case. Although I do not believe that the Attorney General is required to notify Congress in this particular instance, I thought it best to make you aware of the district court's ruling.

1. Section 228(a)(3) of Title 18, U.S.C., makes it a criminal offense when "[a]ny person * * * willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000." Section 228(b) states that "[t]he existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period." 18 U.S.C. 228(b).

2. On June 20, 1999, a grand jury in the District of Rhode Island returned a one-count indictment against the defendant in this case, charging that the defendant, while residing in California, willfully failed to pay his child support obligations with respect to his three children, who reside in Rhode Island, and that the obligations had remained unpaid for a period exceeding two years and were greater than $10,000, in violation of 18 U.S.C. 228(a)(3).

The defendant moved to dismiss the indictment on the ground

that Section 228(b) creates an unconstitutional mandatory presumption. On February 24, 2000, the district court issued its opinion and order holding that Section 228(b) violates the Due Process Clause of the Fifth Amendment. The district court reasoned that, by directing the jury to find that the defendant has the ability to pay based on a court-ordered support obligation, the presumption in Section 228(b) improperly relieves the government of its burden of proving the element in Section 228(a)(3) that the defendant willfully fail to pay a support obligation. See Opinion 13-15. The district court further concluded that Section 228(b) was severable from the remainder of the statute. The district court therefore denied the defendant's motion to dismiss the indictment, but held that the presumption would be disregarded at trial. See Opinion 22.

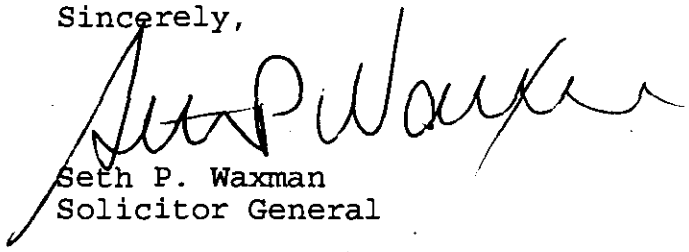
3. In our view, the district court's decision is incorrect. In explaining its decision, the district court reasoned that, "[s]ince the statute requires 'willful' failure to pay support obligations, any presumption which directs a finding of defendant's ability to pay necessarily involves that [intent] element of the offense." We believe that the district court erred in equating the statutory element of willfullness in Section 228(a)(3) with the presumption contained in Section 228(b). The defendant's ability to pay is not an element of the offense under Section 228(a)(3). Moreover, although a defendant's ability to pay child support may be relevant to the defendant's intent in failing to comply with a child support order, the two are not necessarily co-extensive. For instance, a defendant who has the ability to pay a support obligation does not act willfully under Section 228(a)(3) if he is unaware of his obligations under the state court order. For those reasons, it is our intent to continue to defend the constitutionality of the presumption contained in Section 228(b) in cases where the issue is presented.

We nonetheless are not appealing the district court's decision in this case. Under 18 U.S.C. 3731, a court of appeals has jurisdiction over an appeal by the government in a criminal case only in certain specified circumstances, such as when the district court dismisses an indictment, grants a new trial after verdict or judgment, or suppresses or excludes evidence. In this case, the district court did not dismiss the indictment, and the district court did not order the suppression of any evidence. Moreover, we have determined not to seek mandamus of the district court's ruling under 28 U.S.C. 1651(a) because, in our view, the district court's decision will not materially affect our prosecution. See, e.g., In re Cargill, 66 F.3d 1256, 1260 (1st Cir. 1995) (mandamus is an "exceptional remedy" requiring petitioner to show both a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld"), cert. denied, 517 U.S. 1156 (1996). Here,

the district court's decision does not bar the government from introducing the state court's order that the defendant pay child support. In addition to the support order, the government has other evidence that the defendant had the ability to pay his support obligations. Therefore, we do not believe that the absence of the presumption contained in Section 228(b) will adversely affect the government's burden of proving that the defendant had the ability to pay child support.

A copy of the district court's decision is enclosed. The time for appealing expires on March 25, 2000. Please let me know if I can be of further assistance in this matter.

Sincerely,



Seth P. Waxman
Solicitor General

Enclosure

cc: Geraldine R. Gennet, Esq.
General Counsel
United States House of Representatives
Cannon House Office Building
Room 219
Washington, D.C. 20515